

Sierra v Prada Realty, LLC
2011 NY Slip Op 34172(U)
June 23, 2011
Supreme Court, New York County
Docket Number: 402202/09
Judge: Louis B. York
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
YORDY SIERRA and RICKY SIERRA, Infants, by
Their Mother and Natural Guardian, MARGARITA
SIERRA, and MARGARITA SIERRA, Individually,

Plaintiffs,

Index No.: 402202/09

-against-

PRADA REALTY, LLC,

Defendant.

-----X
PRADA REALTY, LLC,

Third-Party Plaintiff,

-against-

Index No.: 590235/10

WEEKS 175th STREET, LLC and LEVITES
REALTY MGT. CORP.,

Third-Party Defendants.

-----X
PRADA REALTY, LLC,

Second Third-Party Plaintiff,

-against-

501 WEST 139th STREET REALTY CORP.,

Second Third-Party Defendants.

-----X
YORK, J.:

Plaintiffs Yordy Sierra and Ricky Sierra, through their mother and natural guardian,
Margarita Sierra, commenced this action to recover damages for injuries which they allegedly
suffered as a result of exposure to lead in an apartment where they resided, located at 501 West

FILED

JUN 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

139th Street, a/k/a 1606 Amsterdam Avenue, Apartment 5B, in Manhattan. Motion sequence numbers 001 and 002 have been consolidated for disposition.

In sequence 001, defendant/third-party plaintiff Prada Realty, LLC, the building management company of 501 West 139th Street, moves, pursuant to CPLR 3402 and Title 22, Part 202.21 (e) of New York Codes, Rules and Regulations, vacating the note of issue and striking the case from the trial calendar. Defendant also moves, pursuant to CPLR 3124 and CPLR 3126, to compel plaintiffs to comply with outstanding discovery demands, or alternatively, to preclude plaintiffs from presenting any evidence at trial for which discovery has not been provided.

In sequence 002, third-party defendants Weeks 175th Street, LLC, and Levites Realty Management, LLC, move, pursuant to CPLR 3401 and Title 22, Part 202.21 (e) of New York Codes, Rules and Regulations, to vacate the note of issue and to extend the time period in which they can move for summary judgement. Third-party defendants also move, pursuant to CPLR 3124, to compel discovery, including post-EBT demands and a demand for authorizations from the Department of Health for Ricky Sierra, or alternatively move, pursuant to CPLR 3126, to preclude plaintiffs from presenting any evidence at trial for which discovery has not been provided.

On November 4, 2009, a preliminary conference was held in which discovery dates were scheduled. During pre-trial discovery, it was disclosed that defendant did not own or manage the apartment building the entire time in which plaintiffs allege that they were exposed to lead, and that Weeks 175th Street, LLC, and Levites Realty Management, LLC, owned and managed the premises and sold it to defendant in February of 2003. As a result, in March of 2010, defendant

commenced the third-party action against both Weeks 175th Street, LLC, and Levites Realty Management, LLC.

On January 20, 2011, defendant filed a second third-party complaint naming 501 West 139th Street Realty Corporation as a second third-party defendant. Defendant contends that it recently learned that 501 West 139th Street Realty Corporation previously owned the subject building from March 1998 until August 2001, a two-year period in which Ricky Sierra lived at the apartment. Defendant argues that it may also need to implead Khash Properties, a company that served as the managing agent at the onset of defendant's ownership of the premises. However, this case is nearly two years old with a significant amount of discovery still to be had between the plaintiff, defendant and first-third party defendants. Now defendant recently in January has impleaded 501 West 139th Street Realty Corp., who will now seek its own discovery adding further to the delay in this action. Defendant third-party plaintiff Prada has been present from the very beginning of this case, and was present at the preliminary conference when the deadline for impleading parties was set by the court as April 4, 2010. If it was not possible to initiate the third-party complaint by that time, a provision was made for a motion requesting authorization for serving the third-party complaint and explaining the reason for the delay. Prada ignored the order, merely serving the second-third party complaint nine months after the deadline. As a result of the foregoing, this second third-party action is severed. The third-party plaintiff shall purchase a new index number and may use the current third-party action's pleadings or may serve a new summons and complaint.

Defendant argues that the note of issue, which was filed on October 14, 2010, must be vacated, because medical, pharmaceutical, and housing authorizations, as well as school records,

were not provided before the September 15, 2010 deposition of Margarita Sierra (Ms. Sierra). Also, after the deposition took place, a post-deposition notice for discovery and inspection was served on plaintiffs on September 24, 2010, which includes demands for authorizations for Family Day Care, a daycare facility Ricky Sierra attended, and KIPP Infinity Charter School, the school where both children attend. Defendant also requests disclosure of the books and pamphlets which Ms. Sierra testified that she read regarding the dangers of lead poisoning and documents concerning medical liens from any governmental agency for medical, psychological, and/or nutritional treatment received by the children as a result of the alleged exposure to lead.

Third-party defendants maintain that the note of issue should be vacated, because plaintiffs have not provided a response to the request for updated authorizations for Yordy Sierra and Ricky Sierra's daycare and school records, information regarding medical liens, and authorizations from the Department of Health in order to determine whether or not the subject apartment had been cited for any alleged lead paint violations prior to 2004. Third-party defendants argue that, because plaintiffs did not provide several authorizations and records prior to Ms. Sierra's deposition, they reserved their rights and planned on conducting a further deposition after the documents were provided. Third-party defendants contend that they have acted diligently and have moved expeditiously in initiating discovery, and that the schools, government entities, and medical and psychological providers, have been slow to process the authorizations.

Plaintiffs maintain that they have provided authorizations for Public School 325, the Department of Health, and the Department of Housing Preservation and Development. Plaintiffs argue that although defendant and third-party defendants request authorizations from Family Day

Care and KIPP Infinity Charter School, they do not object to furnishing the authorizations post-note of issue. Plaintiffs also contend that defendant and third-party defendants have had several opportunities to depose Ms. Sierra, and that they should not be permitted to conduct a further deposition.

The First Department has held that “[w]here a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section 202.21 in some material respect.” *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 390 (1st Dept 2006) (citations omitted); *see also Munoz v 147 Corp.*, 309 AD2d 647, 648 (1st Dept 2003) (holding that the note of issue must be vacated, because the recital in the certificate of readiness that discovery is complete is incorrect).

Here, although plaintiff filed the note of issue and stated that there is no outstanding discovery, it appears that records, documents, and authorizations, which were requested before the note of issue was filed, have not been provided. Therefore, because there remains outstanding discovery, the court will strike the note of issue and plaintiff will have until August 1, 2011 to re-file the note of issue.

Plaintiff must serve a formal response to the post-deposition notice for discovery and inspection dated September 23, 2010, by July 15, 2011. Also, because defendant and third-party defendants did not receive several authorizations and documents before Ms. Sierra’s September 15, 2010 deposition, to the extent that a subsequent deposition of Ms. Sierra is still requested, such further deposition must be limited to questions regarding the records and authorizations, which were not previously provided. The deposition must take place no later than July 29, 2011.

To the extent that plaintiffs have not received IME reports, defendant and third-party defendants must provide a copy of the IME reports to plaintiffs by July 29, 2011.

There will be no adjournments of any of the above dates without prior court approval. Also, as a result of the note of issue being vacated and extended, pursuant to the rules of Part 2, motions for summary judgment must be filed within 60 days of the filing of the note of issue, or will be denied.

In conclusion, it is ORDERED that the motions of defendant/third-party plaintiff Prada Realty, LLC (Sequence 001), and third-party defendants Weeks 175th Street, LLC and Levites Realty Mgt. Group (Sequence 002), to vacate the note of issue are granted, and the note of issue is vacated; and it is further

ORDERED that the second third-party action entitled Prada Realty, LLC v 501 West 39th Street Realty Corp. is severed and third-party plaintiff shall purchase a new index number and may rely on the third-party pleadings or issue a new summons and complaint; and it is further

ORDERED that the second third-party caption shall be removed from this action, and the county Clerk and the Clerk of Trial Support shall mark their records accordingly; and it is further

ORDERED that all further discovery in this matter shall be completed by August 8, 2011; and it is further

ORDERED that, within 15 days from entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that on or before August 8, 2011 and after the completion of discovery, the

plaintiff shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and statement of readiness and payment of the fee therefor.

Dated: June 23, 2011

ENTER:

ly

J.S.C.

LOUIS B. YORK
J.S.C.

FILED

JUN 29 2011

**NEW YORK
COUNTY CLERK'S OFFICE**